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November 10, 1993

Mr. William F. Caton
Acting Secretary,
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Competitive Bidding
PP Docket No. 93-253

Dear Mr. Caton:

Submitted herewith on behalf of Cellular Settlement Groups ("CSG") is an original and nine (9) copies of CSG's Comments with respect to the above docket.

Kindly contact this office directly with any questions or comments concerning this submission.

Respectfully submitted,

William J. Franklin
Attorney for Cellular Settlement Groups

Encs.
cc: Cellular Settlement Groups

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 309(j) of the Communications Act	)	**PP Docket No. 93-253**
	)	
	)	
Competitive Bidding	)	

To: The Commission

COMMENTS OF CELLULAR SETTLEMENT GROUPS

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SUMMARY OF COMMENTS

Houston CUSA Settlement Group, L.C., Dallas CUSA Settlement Group, L.C., Oxnard CUSA Settlement Group, L.C., and Huntington CUSA Settlement Group, L.C., (collectively. the "Cellular Settlement Groups") have entered into full-market settlements for their respective unserved-area filings. Those settlements have been filed with the Commission in full satisfaction of the Commission's settlement rules and procedures.

I

Since the dawn of commercial cellular licensing, the Commission has favored and encouraged the full settlement of contested cellular proceedings in the public interest. That policy expressly applies to unserved-area applications.

Subsections 309(j)(6)(A)&(E) of the Communications Act preserve the Commission's cellular settlement policy. Similarly, Section 309(j)(7)(B) prevents the Commission from considering in potential loss of auction revenues which might result from acceptance of such settlements.

Because a cellular settlement results in a single applicant for a given unserved area, the decision whether to license unserved areas for auction or lottery is irrelevant to the acceptance and processing of full-market settlements. Just as the Commission did when it shifted from comparative hearings to lotteries, it should continue to accept and process cellular full-market settlements.

Acceptance of additional applications for the previously-filed Phase I unserved areas will create administrative nightmares, disrupt the Commission's unserved area licensing scheme, and not serve the public interest.

II

The public interest and the Commission's policy favoring expedited cellular service requires that the pending full-market settlements be immediately processed. The choice is simple: Process the cellular settlements in late 1993, or otherwise license the markets perhaps sometime in 1995 or thereafter.

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To: The Commission

COMMENTS OF CELLULAR SETTLEMENT GROUPS

Houston CUSA Settlement Group, L.C., Dallas CUSA Settlement Group, L.C., Oxnard CUSA Settlement Group, L.C., and Huntington CUSA Settlement Group, L.C., (collectively. the "Cellular Settlement Groups"), by their attorney and pursuant to Section 1.415 of the Commission's Rules, hereby file comments with respect to the Commission's Notice of Proposed Rulemaking in the above-captioned proceeding.[1/] These Comments support the Commission's continued immediate acceptance and processing of full-market settlements for contested initial cellular applications.[2/]

FACTUAL BACKGROUND

The Cellular Settlement Groups were formed during September 1993, as a result of full-market settlements between the respective applicants for the Houston (MSA No. 10B), Dallas (MSA No. 9B), Oxnard-Simi Valley-Ventura (MSA No. 73B), and Huntington-

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[1/] 8 FCC Rcd ____ (FCC 93-455, released October 12, 1993) ("NPRM").

[2/] See NPRM, ¶160 & nn.168-69. Although these Comments are focused on cellular settlements, the Cellular Settlement Group's silence on other issues raised in the NPRM should not be taken to indicate any specific position thereon.

Ashland (MSA No. 110A) cellular unserved areas. Pursuant to Sections 22.23(a), 22.23(g)(4), 22.29, 22.33(b)(3), 22.918(d)(1), and 22.928(b)(5) of the Commission's Rules, the settlement agreement for each market (bearing the original signature of all applicants for each market) was filed on September 22, 1993, and the declarations of no consideration from all applicants in each market were filed between September 29 and October 20, 1993.[3/]

These settlement agreements complied strictly with the Commission's rules and procedures for full-market settlement agreements. For each market, the settlement agreement gave each of applicants therein will have a pro rata share of the ownership and control of the settlement group. No applicant was to receive any compensation (other than its share of the surviving applicant) for entering into the Agreement.

As the threshold matter, the settlement agreements were properly filed pursuant to Section 22.29 of the Commission's Rules. While Sections 22.33(b)(3) and 22.918(d)(1) establish the deadline for filing a full-market settlement (i.e., two days before a scheduled lottery), no rule establishes the earliest date a settlement may be filed. Indeed, those Sections authorize the filing of the settlement agreements, in that the lottery for each market has been only postponed and not cancelled. Further,

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[3/] Section 22.928(b)(1) of the Commission's Rules exempts "bona fide merger agreements" (such as these full-market settlement agreements) from the general requirement that a withdrawing applicant must provide a concurrently filed certification of no excess consideration with its request for dismissal of its application. However, all required declarations of no consideration have been subsequently filed.

Section 22.23(a)(2) provides that the resulting amendment to the surviving application for each market implementing this settlement "may be filed at any time." Thus, in accord with prior cellular practice, a full-market settlement agreement may be filed at any time after the Commission has issued a Public Notice identifying the applications filed for the unserved cellular area in question.

Although the Cellular Settlement Groups satisfied all Commission requirements with their filings, the Mobile Services Division staff informally has advised that it regards the Commission's auction authority as eliminating any opportunity for cellular applicants to enter into full-market settlements. The Staff has further advised that it will take no action on the Cellular Settlement Groups' previously filed full-market settlements.

The Cellular Settlement Groups view the Staff's reading of the auction amendments as incorrect. The Cellular Settlement Groups respectfully suggest that their full-market cellular settlements satisfy all Commission requirements and clearly advance the public interest. Accordingly, they are filing these Comments in support of their position.

I. THE COMMISSION SHOULD CONTINUE TO ACCEPT AND EXPEDITIOUSLY PROCESS FULL-MARKET SETTLEMENTS OF CONTESTED INITIAL CELLULAR APPLICATIONS.

In the NPRM (¶160), the Commission proposed to (a) use auctions to select between pending, mutually exclusive applications for cellular unserved areas and (b) to limit the auction eligibility to the existing applicants for the unserved areas. The FCC also requested comment on "whether the Commission should allow full market settlements in these markets pending the decision of lottery or auction." It also hinted (NPRM, ¶160 n.169) that it regarded cellular full-market settlements as a form of unlawful "collusion" between applicants.

A. Well-Established Commission Policy Favors The Full-Market Settlement of Contested Initial Cellular Applications.

The Commission has a well-established policy favoring full-market settlements of contested cellular applications. This policy developed with the Commission's acceptance of full-market wireline settlements in the Chicago and Los Angeles MSAs in 1983.[4/] At that time, Commission Fogarty best articulated the Commission's settlement policies:

> [T]his Commission has now twice determined that settlements by mutually exclusive cellular radio applicants are in the public interest, convenience and necessity and will be approved by the FCC.... We have been faithful to this paramount regulatory responsibility in encouraging cellular applicant settlements, and this particular settlement agreement -- and those settlements which I hope will follow on both the wireline and

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[4/] Advanced Mobile Phone Service, Inc., 91 FCC 2d 512 (1983) (Chicago); Advanced Mobile Phone Service, Inc., 93 FCC 2d 683 (1983) (Los Angeles).

> nonwireline sides of the split-frequency cellular allocation -- enjoy the full measure of the Commission's approval.[5/]

In applying the lottery process to cellular applications,[6/] the Commission explicitly retained its policy favoring full-market settlements:

> Our long-standing policy of favoring settlements among mutually exclusive cellular applicants has served the public well....[7/]

Thus, by the beginning of RSA cellular licensing, the Commission's policy favoring full-market settlements was fully developed.

The Commission carried this policy forward into the RSA licensing:

> Full settlements would still be permitted since they serve the public interest by simplifying and expediting the licensing process.[8/]

[5/] Los Angeles, supra (Fogarty, Separate Statement).

[6/] Cellular Lottery Rule Making, 98 FCC 2d 175 (1984), modified, 101 FCC 2d 577, further modified, 59 RR 2d 407 (1985), aff'd in relevant part, Maxcell Telecom Plus, Inc. v. FCC, 815 F.2d 1551 (D.C.Cir. 1987).

[7/] Cellular Lottery Rule Making, supra, 101 FCC 2d at 582. Accord, Fresno Cellular Telephone Company, 1985 LEXIS 2427, *12 ("Our policy of encouraging settlements has enabled us to expedite the processing of cellular applications and thus to bring cellular service to the public with a minimum of delay."), aff'd, Maxcell Telecom Plus, supra; Telocator Network of America, 58 RR 2d 1443 (1985) (tax certificates issued to further the Commission's policy favoring full-market settlements); Cellular System One of Tulsa, 102 FCC 2d 86 (1985) (full-market non-wireline settlement agreement approved).

[8/] Rural Cellular Service, 1 FCC Rcd 499 (1986) (Notice of Proposed Rulemaking), adopted in relevant part, 4 FCC Rcd 2440 (Third Report and Order), aff'd, 3 FCC Rcd 6401 (1988) (Fifth Report and Order).

Pursuant to this policy, the Commission approved full-market settlements in numerous markets.[9/]

Finally, the Commission has again reaffirmed this policy in adopting its rules for unserved-area cellular applications:

> 85. Following our current policies for RSAs we will allow full market settlements but no partial settlements.[10/]

Thus, the FCC explicitly found full-market settlements of unserved-area applications to be in the public interest.

Notably, numerous provisions of Part 22 of the Commission's Rules authorize or contemplate the full-market settlement of contested initial cellular applications.[11/] Section 22.29(b) states that "Parties to contested proceedings are encouraged to settle their disputes among themselves." Section 22.33(b)(3) states that "Full settlements among all mutually exclusive applicants in an unserved area are permitted...." Section 22.918(d)(1) states that "Amendments in connection with full

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[9/] See, e.g., Catskills RSA Limited Partnership, 5 FCC Rcd 6715 (Mob.Serv.Div. 1990); Inland Cellular Telephone Company, 5 FCC Rcd 6327 (1990).

[10/] First Report and Order and Memorandum Opinion and Order On Reconsideration, 6 FCC Rcd 6185, 6221 (1991), reconsidered in part, 7 FCC Rcd 7183 (1992).

[11/] These provisions are similar to others which implement the Commission's overall policy favoring settlement of all proceedings with mutually exclusive applications, e.g., common-carrier paging, mobile satellite. (This is also true for broadcast, although not an auctionable service.) Thus, Sections 309(j)(6)(A)&(E) and 309(j)(7)(B) of the Communications Act require the Commission to accept pre-auction settlements for all services. The procedures specified in Paragraph 101 of the NPRM need to implement this statutory requirement.

settlement agreements under §22.29 may be filed no later than two business days prior to the lottery date."[12/]

Thus, at the time Congress was considering the amendments to the Communications Act which were ultimately adopted as part of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), the Commission had a well-established policy favoring, and indeed encouraging, the full-market settlement of contested cellular applications.

B. The Budget Act Explicitly Affirmed The Commission's Existing Policies Favoring The Full-Market Settlement of Contested Cellular Applications.

The Budget Act had no language striking down or otherwise voiding the Commission's acceptance of full-market settlements in contested cellular proceedings. Thus, as a matter of statutory construction, the presumption arises that Congress intended that the Commission's settlement policy to remain effective.

To the contrary, Congress explicitly affirmed the Commission's cellular settlement policy. Specifically, amended Section 309(j)(6) of the Communications Act contains the following "Rules of Construction":

> (6) Rules of Construction.- Nothing in this subsection [309(j)], or in the use of competitive bidding, shall-
>
> (A) Alter spectrum allocation criteria and procedures established by the other provisions of this Act;
>
> * * *

[12/] Similarly, Section 22.23(a)(2) states that "Amendments ... under §22.29 may be filed at any time."

> (E) Be construed to relieve the Commission of the obligation in the public interest to continue to use ... negotiation ... and other means in order to avoid mutual exclusivity in application and licensing proceedings....

The Conference Report accompanying the Budget Act explained that Section 309(j)(6):

> [S]tipulates that nothing in the use of competitive bidding for the award of licenses shall limit or otherwise affect the requirements of the Communications Act that limit the rights of licensees, or require the Commission to adhere to other requirements.[13/]

Without additional explanation, the Conference Report notes that Section 309(j)(6)(E) was added in conference. As a matter of statutory construction, this added provision must be interpreted in accord with its plain meaning in the context of existing Commission practice.

These two provisions in Section 309(j)(6) clearly indicate that Congress intended the Commission to carry forward its existing cellular settlement policies.[14/] The mandated "use

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[13/] Conference Report to the Budget Act, H.R. Rep. 103-213, 103rd Cong. 1st Sess, 103 Cong. Rec. H5792, H5915 (August 4, 1993) (provision of House bill adopted in final Budget Act) ("Conference Report").

[14/] Section 309(j)(1) states that, "If mutually exclusive applications are accepted for filing ..., then the Commission shall have the authority ... the grant such license ... through the use of system of competitive bidding that meets the requirements of this subsection." (Emphasis added.) Tellingly, Section 309(j)(1) does not require that the Commission must use competitive bidding, but only that it has the authority to do so in appropriate cases. That language, together with the incorporation of Sections 309(j)(6)(A)&(E) and 309(j)(7)(B) ("the requirements of this subsection") clearly indicates the legislative intent to make mutually exclusivity only a prerequisite to holding an auction, and not the triggering event for a mandatory auction against the wishes of settling applicants.

[of] negotiation ... and other means in order to avoid mutual exclusivity in application and licensing proceedings" can only mean that full-market settlements (which is the product of negotiation and which avoids mutual exclusivity) are to be permitted under competitive bidding.

Further, amended Section 309(j)(7) of the Communications Act precludes the Commission from making its auction decisions "solely or predominantly on the expectation of federal revenues from the use of a system of competitive bidding...." This clearly indicates a statutory prohibition against the Commission refusing to accept full-market settlements because of the potential for lost auction revenues.

C. A Decision Whether to License Initial Contested Cellular Applications By Auction or Lottery Is Irrelevant to the Processing of a Full-Market Settlement.

Once the Cellular Settlement Groups filed their respective full-market settlement agreements, their settled markets are not eligible for either a lottery or competitive bidding. Section 309(i)(1)(A) of the Communications Act, as amended by the Budget Act, authorizes the Commission to hold a lottery only when "there is more than one application for any initial ... construction permit ...." This statutory prerequisite to a lottery no longer exists here.

Similarly, amended Section 309(j)(1) of the Communications Act authorizes the Commission to utilize competitive bidding only when there are mutually exclusive applications for a market.

Indeed, the Budget Act and its legislative history clearly indicate that the Commission cannot utilize competitive bidding with respect to the sole applicant which results from a full settlement of mutually exclusive applicants.[15/]

Thus, a decision whether to process unserved-area cellular applications by lottery or auction is irrelevant to the processing of a full-market settlement agreement. A lottery with one applicant is as meaningless as an auction with one bidder.[16/] Indeed, the NPRM (¶22) recognizes that "if mutual exclusivity among applications does not exist, a license is not subject to competitive bidding."

Because only a single application of each of the Cellular Settlement Groups remains for each settled market, the Commission must designate the application as the Tentative Selectee for the Area in accord with its existing procedures.[17/] Notably, the

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[15/] See Section 309(j)(6)(E) of the Communications Act (Commission required to continue using negotiations as a method of eliminating mutual exclusivity); Conference Report, supra, 103 Cong. Rec. at H5915.

[16/] In this context, the Commission's implicit characterization of full-market cellular settlement efforts as prohibited "collusion" (NPRM, ¶160 n.169, citing NPRM, ¶¶93-94) is shocking. As noted above, the Commission has "encouraged and favored" full-market settlements since 1983 as being "in the public interest". As a matter of law, settlement negotiations explicitly permitted by the Commission's cellular policies and rules cannot be collusive.

[17/] See, e.g., Public Notice, "Announcement of Acceptance of Applications and Tentative Selectees for Unserved Areas" (Mimeo No. 34770, released September 7, 1993). In accord with the procedures established by that Public Notice and unless otherwise instructed by the Commission, the Surviving Applicant would file its hard-copy application within 7 days of being named Tentative Selectee and its Section 1.65 amendment within 30 days thereof.

Commission followed a similar procedure in 1984 (during its consideration of the then-proposed cellular lottery rules) by granting applications in formerly contested MSA markets in which full-market settlements were reached.[18/]

D. The Public Interest Would Be Disserved If the Previously Filed, Phase I Cellular Unserved Areas Were Opened To New Applicants.

Finally, the Commission (NPRM, ¶160) requested comment on whether the filing window for pending Phase I unserved-area cellular applications should be reopened. Unlike perhaps the 220 MHz proceeding, there appears to be no dispute that the filing procedures for the unserved-area applications were proper.[19/] Thus, no reason exists to reopen the existing Phase I filing windows.

Further, reopening some of the filing windows would necessarily require reopening all of them, which could result in new Phase I applications being filed in markets in which no applications (or only one application) had been filed. This, in turn, could invalidate Phase II filings for certain markets. The resulting administrative delay and regulatory confusion would serve no purpose, but would disadvantage the public interest.

[18/] Cellular Lottery Rulemaking, supra, 98 FCC 2d at n.22.

[19/] To be sure, certain parties have challenged the substance of the Commission's unserved-area rules. Licensing of unserved-area full-market settlement groups may be reconciled with the existence of such challenges by conditioned such licenses on the outcome of the challenges. However, unlike a procedural challenge to the unserved-area filings, even a reversal of the Commission's unserved-area rules would not automatically require that all granted unserved-area licenses be rescinded.

Accordingly, the Commission should not reopen any Phase I filing windows.

II. ACCEPTANCE AND PROCESSING OF CELLULAR UNSERVED-AREA FULL-MARKET SETTLEMENTS DURING THE PENDENCY OF THIS RULEMAKING WILL EXPEDITE CELLULAR SERVICE AND SERVE THE PUBLIC INTEREST.

A cornerstone of the Commission's cellular policies has been to expedite the nationwide provision of cellular service. The Commission has repeatedly held that expedited cellular service serves the public interest. In the context of the unserved-area cellular full-market settlements, the Commission should apply those policies to process the Cellular Settlement Groups' pending full-market settlements.

At the minimum, the Commission is likely not to issue its first decision in this proceeding until early March of next year. According to press reports, that decision could involve only PCS licensing, which is the subject of a specific statutory deadline. In any event, the Commission will receive numerous Petitions for Reconsideration and perhaps appellate challenges to its competitive bidding rules. Based on the Commission's experience in implementing auctions, those proceedings are likely add a year or so to the beginning of competitive bidding for cellular licenses.

Moreover, until the Commission completes certain rulemakings and the Secretary of Commerce has submitted to the Commission his report recommending the immediate reallocation of at least 50 MHz

of suitable government spectrum,[20/] Section 309(j)(10) denies all auction authority to the Commission. NPRM, ¶15.

Although the specific scenario is unclear, the uncertainty surrounding these procedures renders a substantial delay in licensing contested unserved-area cellular applications a certainty. Accordingly, anything that the Commission can do during the pendency of this proceeding to license some unserved areas will serve the public interest. The choice is simple: Process the cellular settlements in late 1993, or otherwise license the markets perhaps sometime in 1995 or thereafter.

As the Cellular Settlement Groups have described above, the Commission can advance the public interest by immediately processing their full-market settlements.

[20/] The Commission has no control over the speed with which the Commerce Department or the other federal agencies using this spectrum might proceed. Amateur Washington historians will recall that the "temporary" buildings erected on the Mall during World War II for the Navy were taken down during the second Nixon administration, and then only after President Nixon threatened to replace the Joint Chiefs of Staff.

CONCLUSION

Accordingly, the Cellular Settlement Groups respectfully request the Commission to honor its existing policies which favor the full-market settlement of contested cellular applications. The Commission should immediately process the Cellular Settlement Groups' respective pending full-market applications.s

Respectfully Submitted,

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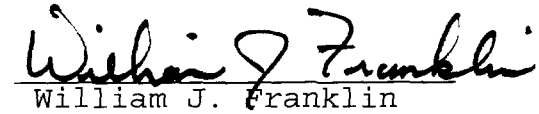
By: 
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